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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

NO. 8

UNITED STATES OF AMERICA, *Appellant*,

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE

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NO. 83

UNITED STATES OF AMERICA, *Appellant,*

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Whether a violation of section 5(a)(1)(D) of the Subversive Activities Control Act is charged by an indictment which does not allege that the accused (1) had knowledge that the organization of which he is alleged to be a member had an unlawful purpose, (2) had the specific intent of furthering such purpose, and (3) was an active member of the organization.

2. If question 1 is answered in the affirmative, whether section 5(a)(1)(D) is constitutional.

3. Whether a violation of section 5(a)(1)(D) is charged by an indictment alleging that the accused is a member of an organization which is required by a final order of the Subversive Activities Control Board to register as a Communist-action organization, but not alleging that the organization is, in fact, a Communist-action organization.

4. If question 3 is answered in the affirmative, whether section 5(a)(1)(D) is constitutional.

5. Whether section 5(a)(1)(D) is unconstitutional, on its face and as applied, because it disqualifies persons for employment in facilities designated by the Secretary of Defense as defense facilities without giving such persons an opportunity for a hearing on or to secure review of the validity of the designations.

6. Whether section 5(a)(1)(D) is unconstitutional as applied because the order of the Board requiring the Communist Party to register as a Communist-action organization has been invalidated by facts susceptible of judicial notice establishing that the world Communist movement described in section 2 of the Act does not exist.

STATEMENT OF THE CASE

This is an appeal from the dismissal of a one count indictment (R. 1-2) returned on May 21, 1963, charging appellee with the offense of engaging in employment in a defense facility while a member of the Communist Party, in violation of section 5(a)(1)(D) of the Subversive Activities Control Act (herein called the Act).

The Act

Section 5 of the Act provides that when a Communist-action or Communist-front organization[1] is required by

[1]The section uses the term "Communist organization," defined in section 3(5) to include Communist-action, Communist-front and Communist-infiltrated organizations. Since the last are not required to register under the Act, section 5 is inapplicable to their members.

a final order of the Subversive Activities Control Board (herein called the Board) to register under the Act, members of the organization having "knowledge or notice" of the issuance of the order[2] become subject to various prohibitions with respect to employment in the federal government, labor unions and defense facilities. Section 5 (a)(1)(D) provides that if the organization in question is a Communist-action organization, the members may not engage in any employment in a defense facility. A defense facility is defined as any establishment or enterprise which the Secretary of Defense has designated as such for the purposes of the Act and which has posted notices of the designation. Secs. 5(b) and 3(7).[3]

A violation of section 5 is punishable by imprisonment for five years and fine of $10,000. Sec. 15(b).

The Act's definition of a Communist-action organization (sec. 3(3)) is tied in with the findings of section 2. Section 2 finds that there exists a world Communist movement which is under the discipline, direction and control of the Communist dictatorship of an unnamed foreign country, and which seeks by criminal and other means

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[2] Under section 13(k), publication in the Federal Register of the fact that a registration order has become final constitutes notice of the fact to all members of the organization against which the order was issued.

[3] These sections, as originally enacted, required the Secretary of Defense to publish a list of the names of the designated facilities in the Federal Register. In 1962, after the registration order against the Communist Party became final, this requirement was eliminated in response to representations by the Departments of Defense and Justice that it "creates a situation dangerous to the national defense and jeopardizes national security since that list could be used as a guidebook for sabotage and for the selection of military targets by any potential enemy." Letter from the then Deputy Attorney General White to the Chairman of the Senate Committee on the Judiciary, Sen. Rep. No. 1443 (to accompany H.R. 9753), 87th Cong., 2d Sess., pp. 5-6.

to overthrow existing governments and replace them by "Communist totalitarian dictatorships" subservient to the controlling foreign dictatorship. Section 3(3) defines a Communist-action organization as an organization which is substantially directed, dominated or controlled by the foreign government controlling the world Communist movement and which operates primarily to advance the objectives of that movement.

The Act authorizes proceedings before the Board, on petition of the Attorney General, for a determination that an accused organization is a Communist-action organization and for an order requiring it to register as such with the Attorney General. Secs. 7, 13. A registration order becomes final upon the exhaustion of judicial review. Sec. 14(b).

The Communist Party registration proceeding

On November 22, 1950, the Attorney General petitioned the Board for an order requiring the Communist Party to register as a Communist-action organization. The desired order was issued on April 20, 1953, following an administrative hearing. In an accompanying Report, the Board found that the unnamed foreign power referred to in section 2 was the Soviet Union. The order became final on October 20, 1961, as a result of the decision in *Communist Party v. S.A.C.B.*, 367 U.S. 1.[4] That decision, while sustaining the registration order, reserved all other questions arising under the Act, including (at 79) the constitutionality of section 5.[5]

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[4] Under section 14(b), the order became final ten days after issuance of the Court's mandate following denial of a petition for rehearing. 368 U.S. 871.

[5] The Communist Party has refused to register in compliance with the order which, it maintains, cannot constitutionally be enforced. It has twice been convicted for its refusal. The Court of Appeals reversed the first conviction, but gave the government the option of another trial. *Communist Party v. United*

The proceedings below

The indictment (R. 1-2) alleges that:

1. A final order requiring the Communist Party to register as a Communist-action organization has been in effect since October 20, 1961.

2. On August 20, 1962, the Secretary of Defense designated the Todd Shipyards Corporation, Seattle Division, as a defense facility, and notices of the designation have been posted about the plant.

3. Since November 19, 1962, appellee has unlawfully and wilfully engaged in employment in the plant while a member of the Communist Party with knowledge and notice both of the final registration order[6] and of the designation of the plant as a defense facility.

Appellee moved to dismiss the indictment (R. 3-5) and later filed an amended motion to dismiss.[7]

The District Court deferred decision on the motion pending this Court's disposition of *Aptheker v. Secretary of State*, 378 U.S. 500, and *United States v. Brown*, 381 U.S. 437. Thereafter it dismissed the indictment. (R. 7, 9.)

In an opinion accompanying his order, the District Judge stated (R. 7):

States, 331 F.2d 807, cert. den. sub nom. *United States v. Communist Party*, 377 U.S. 968. An appeal from the second conviction has been argued in the Court of Appeals, where it is awaiting decision. *Communist Party v. United States*, Nos. 19880-81. C.A.D.C.

[6] In accordance with section 13(k) of the Act, notice that the registration order had become final was published in the Federal Register on October 21, 1961.

[7] The amended motion was inadvertently omitted from the record initially certified to this Court and from the printed record. It was certified subsequently and, by agreement with the Solicitor General, is set forth in the Appendix, *infra*.

> "For the purpose of this motion certain pertinent facts alleged in the proceedings may be assumed as true. They are that Robel, a native-born citizen of the United States, approximately fifty-four years of age, has been employed as a shipyard worker at the Todd Shipyards for a period in excess of ten years. During that time he has been, and still is a member of the Communist Party." [8]

The court ruled that the indictment fails to charge an offense against the United States because it does not allege that appellee "was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes" (R. 9). The absence of these allegations, the court held (*ibid.*), was fatal to the indictment under *Aptheker* and *Brown, supra,* and *Scales v. United States,* 367 U.S. 203, and *Noto v. United States,* 367 U.S. 290. The court recognized that section 5(a)(1)(D) does not in terms make knowledge of an unlawful purpose of the organization, specific intent to effectuate this purpose, or active membership elements of the offense. It observed (*ibid.*) that, "This omission may ultimately serve to render [the section] unconstitutional as it did with respect to section 6 of the Act (50 U.S.C. § 785). *Aptheker v. Secretary of State, supra.* at page 511, footnote 9."

SUMMARY OF ARGUMENT

I.

Section 5(a)(1)(D), as written and applied, violates substantive due process and the First Amendment, and is not susceptible of the construction given it by the court below.

The section makes it a crime for an individual to hold defense facility employment solely because of his mem-

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[8] Following appellee's indictment and arrest, he was released on his own recognizance, and immediately returned to his job as a machinist at the Todd Shipyards, where he has worked ever since.

bership in a Communist-action organization, without regard to his lack of knowledge of any unlawful organizational purpose, lack of unlawful intent, and lack of organizational activity. Furthermore, it prohibits a member from holding *any* job in a defense facility, including one that is obviously non-sensitive.

The effect of the section is to establish an irrebuttable presumption that all members of a proscribed organization, simply because of their membership, will be likely to engage in unlawful activity endangering the national security whenever they are given access to a defense facility. The restriction on employment imposed by the section is substantial since the Secretary of Defense is authorized to designate almost any place of employment as a defense facility and has already so designated some 3000 establishments.

A.

Section 5(a)(1)(D) violates the requirement of substantive due process that governmental interference with the freedom to hold private employment must be reasonable and bear a substantial relation to the object sought to be obtained, which in this case is the protection of the national security against the alleged dangers presented by the world Communist movement.

1. The invalidity of section 5(a)(1)(D) is established by the same considerations that led the Court in *Aptheker v. Secretary of State* to conclude that the passport prohibition of section 6 of the Act violated substantive due process.

Section 5, like section 6, "sweeps within its prohibition both knowing and unknowing members," and "renders irrelevant the member's degree of activity in the organization and his commitment to its purpose." Section 5, like section 6, excludes consideration of other relevant factors, since it applies both to an insensitive job and to

one that the member has no ulterior purpose in holding. Also, as in the case of section 6, less drastic means of achieving the legislative objective were available. These are exemplified by the Industrial Security Program and by the legislation proposed in the Report of the Commission on Government Security. They also appear from the statements of the Department of Justice and the President in opposing the approach of section 5(a)(1)(D) as unwise and unnecessary.

There is no substance to the government's attempt to distinguish the present case from *Aptheker*. Both cases involve members of what the Board found to be a Communist-action organization. The right to work is just as basic as the right to travel. There is no foundation in fact for the contention that less drastic legislation providing for the security clearance of employees of defense facilities, instead of the outright prohibition of section 5 (a)(1)(D), would be administratively infeasible. And the inability of the government to substantiate the alleged danger of espionage and sabotage by Communists employed in defense facilities demonstrates that it is no more "dangerous" to permit them to hold such employment than it is to permit them to travel abroad.

2. Section 5(a)(1)(D) is invalid under decisions of the Court that individual guilt or disqualification for employment may not be conclusively presumed merely from the fact of organizational membership, unaccompanied by knowledge that the organization has an unlawful purpose, an intent to effectuate this purpose, and activity to that end. Under these decisions, the rule of *Aptheker* applies to employment. The decisions relied on by the government to sustain the constitutionality of section 5(a)(1)(D) are inapplicable.

3. The Act's justification for section 5(a)(1)(D) rests on findings that the world Communist movement seeks to achieve its ultimate political objective by means of espionage, sabotage and other unlawful means. While the Report of the Board in the registration proceeding against

the Communist Party found that the Party operates primarily to advance the objectives of the world Communist movement, it found no acts of or plans to commit espionage or sabotage by the Party or its members. Nor did it find that the Party or its members have engaged in any other unlawful acts or advocacy. Accordingly, there is no foundation in fact for the government's contention that the issuance of the registration order against the Party must have alerted its members to the fact that the organization has an unlawful purpose. Moreover, the Report of the Board belies the Congressional findings which supply the only constitutional justification for section 5(a)(1)(D), at least as applied to the members of the Communist Party.

B.

Section 5(a)(1)(D) violates the First Amendment by excluding individuals from large areas of private employment solely because of their membership in a minority political party, thereby infringing "the cherished freedom of association."

Even if Congress were justified in finding that some Communists, if given the opportunity, will commit espionage and sabotage in defense facilities, the blunderbuss approach of section 5(a)(1)(D) would be invalid under the principle that legislation touching First Amendment rights must be narrowly drawn to punish only such conduct as constitutes a clear and present danger.

Section 5(a)(1)(D) is patently over-broad not only because it imposes sanctions solely because of membership in the Communist Party but because the sanctions apply to all persons who may be found to be members under the vague and expansive indicia of membership prescribed by section 5 of the Communist Control Act and approved in *Killian v. United States*. And since the standards for determining whether an organization is a Communist-action organization and whether an accused individual is a member focus on views and policies and their